

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

Pacific Power, LLC,

Appellant,

RE: Photon Finance, LLC-Sunpower;
VERT Investment Group; Element Power
US, LLC; Energy Matters, LLC; Silverado
Power, LLC; and Everpower Wind
Holdings, Inc.

Appealed From Size Determination Nos. 2-
2013-158, -163, -164, and 6-2013-117, -
118, and -119

Solicitation No. W912DY-11-R-0036

SBA No. SIZ-5520

Decided: December 11, 2013

APPEARANCES

Richard B. Oliver, Esq., J. Matthew Carter, Esq., McKenna Long & Aldridge LLP, Los Angeles, California, for Appellant

Reid Rutherford, Chief Executive Officer, Photon Finance, LLC, Mountain View, California

DECISION

I. Introduction and Jurisdiction

These appeals arise from a group of size determinations dismissing protests filed by Pacific Power, LLC (Appellant) on grounds that Appellant lacked standing to protest and that Appellant's protests were untimely. Appellant maintains that the dismissals were improper. For the reasons discussed *infra*, the appeals are granted, and the protests are remanded for new size determinations.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et*

seq., and 13 C.F.R. Parts 121 and 134. Appellant timely filed the instant appeals on October 18, 2013.¹ Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation, Protests, and Size Determinations

On July 30, 2012, the U.S. Army Corps of Engineers (Corps) issued Request for Proposals (RFP) No. W912DY-11-R-0036 seeking contractors to provide locally-generated renewable and alternative energy at military installations. According to the RFP, the Corps planned to award Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts to “all responsible and qualified Offerors, whose proposals conform to the solicitation and are rated acceptable or better.” (RFP § M.1.) The procurement was not set-aside or otherwise restricted to small businesses. However, the RFP required that all offerors (*i.e.*, both large and small businesses) submit a “Small Business Participation Plan”, and that all large businesses submit a separate “Small Business Subcontracting Plan”. (*Id.* § L.6.) According to the RFP, work performed by the prime contractor “will be evaluated as Small Business Participation” if the prime contractor itself qualifies as a small business. (*Id.* § M.2, Factor 4.)

On August 28, 2013, Appellant received a notice from the Contracting Officer (CO) that 22 firms — including Element Power US, LLC (Element); Energy Matters, LLC (Energy); Photon Finance, LLC-SunPower (Photon); and Silverado Power, LLC (Silverado) — had been selected for a group of solar technology awards. The notice stated that Appellant had not been chosen because its “proposal was not qualified and responsible.” (Notice at 3.) On September 6, 2013, Appellant submitted four protest letters to the CO challenging the size status of Element, Energy, Photon, and Silverado. The protest letters indicated that Appellant had contacted the CO and the Contract Specialist by telephone on September 5, 2013, and had “provided an oral size protest” at that time. (Protests, at 1.) Each letter further stated that “[t]his letter, submitted within one business day of the oral size protest, confirms the oral protest pursuant to the requirement of [Federal Acquisition Regulation (FAR)] 19.302(d)(1)(i).” (*Id.* at 2.)

On September 9, 2013, Appellant was notified that it was not among a group of 17 firms

¹ Ordinarily, an appeal must be filed within fifteen calendar days after receipt of the size determination. 13 C.F.R. § 134.304(a). In this case, however, at the time the appeals would have been due, OHA's offices were closed because of a lapse of appropriations. OHA posted a notice on its website that:

All filings commencing a case, or a Petition for Reconsideration, due from October 1, 2013, until the day the Government resumes normal operations are now due by 5:00 pm Eastern time on the first business day after the Government resumes normal operations.

The Government resumed normal operations on October 17, 2013, and these appeals were timely filed the next business day, October 18, 2013.

awarded contracts for wind technology. On September 12, 2013, Appellant filed written size protests challenging the small business status of two of the awardees, EverPower Wind Holdings, Inc. (EverPower) and VERT Investment Group (VERT).

The CO directed the Energy, EverPower, and VERT protests to SBA's Office of Government Contracting, Area II (Area Office II). The Element, Photon, and Silverado protests were referred to SBA's Office of Government Contracting, Area VI (Area Office VI).

On September 19, 2013, Area Office VI issued Size Determination Nos. 6-2013-117, -118, and -119, dismissing Appellant's protests against Element, Photon, and Silverado. Area Office VI stated that Appellant lacked standing to protest under 13 C.F.R. 121.1001(a)(1) because Appellant's proposal "is considered to have been eliminated for reasons other than size." (Size Determination Nos. 6-2013-117, -118, and -119, at 2.) In addition, Area Office VI stated, the protests were untimely. (*Id.*) The size determinations did not address Appellant's contention that Appellant had timely filed telephonic protests on September 5, 2013.

On September 24, 2013, and September 26, 2013, Area Office II issued Size Determination Nos. 2-2013-158, -163, and -164, dismissing Appellant's protests against Energy, EverPower, and VERT. Area Office II found that Appellant was not an interested party to protest because Appellant's "proposal was deemed not acceptable and not responsible." (Size Determination Nos. 2-2013-158, -163, and -164, at 1.) In addition, Appellant's protest against Energy was due by September 5, 2013, but was filed one day later and was therefore untimely. (Size Determination No. 2-2013-158, at 1.) The size determination did not address Appellant's alleged telephonic protest against Energy.

B. Appeals

On October 18, 2013, Appellant filed the instant appeals, contending that the Area Offices applied the wrong regulation in dismissing Appellant's protests for lack of standing. Appellant further insists that its protests against Energy, Element, Photon, and Silverado were improperly dismissed as untimely. Because the appeals pertain to the same procurement, and present similar issues, OHA consolidated the appeals into a single proceeding.

Appellant maintains that the Area Offices "used the wrong 'interested party' regulatory standard for this solicitation." (Appeal² at 12.) Specifically, the Area Offices utilized 13 C.F.R. § 121.1001(a)(1), which applies to procurements which are set-aside for small businesses. The instant RFP, however, was not a small business set-aside, as demonstrated by the fact that "both large and small businesses submitted proposals and received awards." (*Id.*) Appellant asserts that the correct regulatory standard is 13 C.F.R. § 121.1001(a)(7), which governs size protests on full and open procurements. According to that regulation, "[a]ny offeror" may submit a size protest, regardless of whether that offeror's proposal was eliminated for reasons unrelated to size. "[Appellant] submitted an offer and, therefore, qualifies as an interested party" under 13 C.F.R. § 121.1001(a)(7). (*Id.*)

² Unless otherwise indicated, citations are to the pleadings in the Photon appeal.

Next, Appellant argues that the four size determinations which found Appellant's protests to be untimely are in error. Appellant emphasizes that on September 5, 2013, the date size protests were due on the solar technology awards, Appellant telephoned both the CO and the Contract Specialist and "left detailed voicemail messages" challenging the size status of Energy, Element, Photon, and Silverado. (*Id.* at 11.) SBA regulations and the FAR permit telephonic protests, provided that the protest is subsequently confirmed in writing the next business day. 13 C.F.R. § 121.1005; FAR 19.302(d)(1)(i). Appellant complied with those procedures here, and its protests were therefore timely.

Appellant also argues that the Corps improperly determined Appellant "not qualified and responsible." (*Id.*) Appellant asserts that the purported deficiencies in its proposal pertained to Appellant's financial capability, but that the Corps would have been required to refer any concern about Appellant's responsibility to SBA under the Certificate of Competency procedures. (*Id.* at 14.) Appellant states that it is pursuing a separate bid protest at the U.S. Government Accountability Office challenging these issues. (*Id.* at 5.)

Accompanying its appeals, Appellant moved to supplement the record with new evidence. Specifically, Appellant seeks to introduce a sworn declaration from Mr. Steven McArthur, Appellant's General Counsel, stating that on September 5, 2013, he telephoned the CO and the Contract Specialist, and left detailed voicemails for each of them stating Appellant's grounds for protesting the size of the small businesses that had been awarded solar technology contracts. Mr. McArthur further swears that he alerted the CO and Contract Specialist that Appellant would be filing written size protests the next day. Appellant also seeks to introduce Mr. McArthur's cell phone records, demonstrating that Mr. McArthur placed calls to the CO and Contract Specialist on the afternoon of September 5, 2013. Appellant maintains there is good cause to admit this new evidence because the Corps evidently failed to inform the Area Offices that Appellant had timely filed telephonic protests on September 5, 2013. Had the Area Offices been aware of these facts, they would not have concluded that Appellant's protests were untimely. (*Id.* at 4-5.)

C. Appeal Supplement

On November 6, 2013, after reviewing the record, Appellant filed a supplement to its appeals. Appellant observes that, according to unsworn and unsupported statements in the record, the CO and Contract Specialist denied receiving Appellant's voicemails of September 5, 2013. Appellant, however, has provided Mr. McArthur's sworn declaration, as well as corroborating phone records, demonstrating that Appellant did leave detailed voicemails for the CO and the Contract Specialist on September 5, 2013 stating Appellant's grounds for protest. Appellant contends that "OHA should give greater weight to Mr. McArthur's sworn testimony and supporting records and hold that [Appellant] made timely oral size protests on September 5, 2013." (*Id.* at 3.)

Appellant argues that *Size Appeal of Standard Communications, Inc.*, SBA No. SIZ-5322 (2012) is highly analogous to the case presented here. In *Standard Communications*, a protester maintained that it had timely filed a telephonic size protest, but the CO asserted that he did not receive the protest. OHA granted the appeal, concluding that a sworn affidavit stating that an oral

protest was left on the CO's voicemail, together with phone records demonstrating that a call took place, hold greater evidentiary weight than unsupported statements to the contrary. (*Id.* at 3-4.) Similar facts are found here, so OHA should grant the instant appeals. (*Id.* at 5.)

D. Photon's Response

On November 6, 2013, Photon responded to the appeals. Photon asserts that it is a small business concern under the size standard associated with the RFP. However, according to the research Photon has conducted, Element, Energy, EverPower, Silverado, and VERT likely do not qualify as small businesses. Photon takes no position on whether Appellant's protests were properly dismissed.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeals. Specifically, Appellant must prove that the size determinations are based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. New Evidence

New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

In this case, I find that Appellant has shown good cause to admit Mr. McArthur's sworn declaration and telephone records. This evidence is relevant to the issues on appeal — *i.e.*, whether Appellant filed timely telephonic size protests — and will not unduly enlarge the issues at hand. Furthermore, Appellant persuasively argues that it could not have offered this evidence to the Area Offices at an earlier time, because Appellant was unaware that the timeliness of its protests was disputed. Indeed, as Appellant correctly observes, OHA accepted substantially similar evidence in *Standard Communications* on grounds that the area office “did not inform [the protester] prior to issuing the Size Determination that the timeliness of the protest was at issue.” *Standard Communications*, SBA No. SIZ-5322, at 4. For these reasons, Appellant's motion is GRANTED and the new evidence is ADMITTED into the record.

C. Analysis

The Area Offices in this case dismissed Appellant's protests on two separate grounds. First, the Area Offices found that Appellant lacked standing to protest because its proposal for

the underlying procurement had been eliminated for reasons unrelated to size. Second, the Area Offices determined that four of the six protests were also untimely, as the protests were filed one day after the September 5, 2013 protest deadline. As discussed *infra*, Appellant has established that neither of these grounds for dismissal is valid. As a result, the dismissals are vacated and the size protests are remanded to the Area Offices for new size determinations.

The Area Offices first found that Appellant was not an interested party to protest because Appellant's proposal was eliminated from award consideration for issues other than size. In reaching this conclusion, the Area Offices relied upon 13 C.F.R. § 121.1001(a)(1)(i), which indicates that “[a]ny offeror whom the contracting officer has not eliminated for reasons unrelated to size” may file a size protest on a small business set-aside. The instant procurement, however, was not a small business set-aside but rather an unrestricted procurement open to both large and small businesses. *See* Section II.A, *supra*. For unrestricted procurements, the applicable regulation is 13 C.F.R. § 121.1001(a)(7), which permits “[a]ny offeror” to pursue a size protest, provided that the challenged firm represented itself as a small business concern. Appellant indisputably was an offeror for this unrestricted procurement, and thus had standing to initiate a size protest. Further, it appears from the record that each of protested concerns represented itself as a small business. Accordingly, the Area Offices clearly erred in concluding that Appellant lacked standing to bring a size protest.

The remaining issue is whether Appellant's protests against Element, Energy, Photon, and Silverado were properly dismissed as untimely. Appellant contends that it filed telephonic protests against these concerns on September 5, 2013, and submitted written confirmation the next business day. Both the FAR and SBA regulations expressly authorize such an approach. FAR 19.302(d)(1)(i); 13 C.F.R. § 121.1005. Further, OHA has previously recognized that a size protest left on a CO's voice mail may constitute a valid telephonic size protest, even if the CO subsequently denies receiving the voice mail. *Standard Communications*, SBA No. SIZ-5322, at 4-5.

Here, the record as a whole demonstrates that Appellant did make timely telephonic protests on September 5, 2013, the fifth business day after Appellant learned the identity of the solar technology awardees. Mr. McArthur's sworn declaration, and his telephone records, give significant weight to these claims. Appellant's protest letters of September 6, 2013 likewise indicate that Appellant filed oral protests against Element, Energy, Photon, and Silverado on September 5, 2013. *See* Section II.A, *supra*. Additionally, the record contains e-mail exchanges between Mr. McArthur and the CO, in which Mr. McArthur reiterates that he left voicemails on September 5, 2013 stating Appellant's protest grounds. Although the CO and Contract Specialist apparently advised the Area Offices that these voice mails were not received, OHA must give greater evidentiary weight to Mr. McArthur's sworn statement, which is corroborated by the contemporaneous record. 13 C.F.R. § 121.1009(d); *Standard Communications*, SBA No. SIZ-5322, at 5.

IV. Conclusion

The Area Offices erred in dismissing Appellant's protests as untimely and for lack of standing. Appellant had standing to protest under 13 C.F.R. § 121.1001(a)(7), and timely filed

telephonic protests on September 5, 2013, which were confirmed in writing the next business day. Accordingly, the appeals are GRANTED, the size determinations are VACATED, and the case is REMANDED to the Area Offices for new size determinations.

KENNETH M. HYDE
Administrative Judge